

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K STREET, N.W.  
WASHINGTON, D.C. 20001-8002**

**DATE: March 21, 1997**

**CASE NO: 94-INA-598**

**In the Matter of:**

**MARYSE PIERRE-LOUIS,  
Employer,**

**On Behalf of:**

**JEANNETTE DARAN,  
Alien.**

Appearance: Laurence F. Johnson, Esquire  
Wheaton, MD  
for the Employer

Before: Neusner, Vittone, and Wood  
Administrative Law Judges

PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Jeannette Daran ("Alien") filed by Employer Maryse Pierre-Louis ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Philadelphia, PA, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On July 22, 1993, as amended, Employer filed an application for labor certification to enable the Alien, a Haitian national, to fill the position of "Cook, Domestic Service." There was no educational requirement, but two years experience in the job offered or one year training in domestic sciences and one year household experience were required. The job offered was described (in item # 13) as:

Plan menus and cook meals in private home according to the desires of employer. Peel, wash, trim and prepare vegetables and meats for cooking. Cook vegetables and bake breads and pastries. Boil, broil, fry and roast meats. Order supplies and food stuffs. Clean kitchen and cooking utensils and serve meals.

(AF 13, 37). Other Special Requirements were:

Must not smoke on premises.  
Must have verifiable references.  
Must be willing to work evenings and weekends as needed.

Must be able to perform duties in item #13.

(AF 13, 37). The application also indicated that the Alien had been working for the Employer since April 1991, she had previously worked as a Domestic Cook for one year with another employer, she had one year and ten months experience as a Babysitter/Housekeeper (including meal preparation) for another employer, and she had a certificate in Domestic Science reflecting training from 1980 to 1981 with a Haitian school. (AF 15-16, 39-40).

A recruitment report from the Employer indicated that there were no applicants for the position who responded to the advertisement placed in the *Washington Times* or the internal posting. (AF 26).

On January 14, 1994, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application on several bases. Specifically, the CO determined that the Employer had failed to adequately document that (1) the job offer meets the definition of "employment" by establishing that it is full-time and by responding to certain questions (citing 20 C.F.R. § 656.3); (2) the job opportunity is clearly open to qualified U.S. workers and is a bona fide opportunity as opposed to one created for the purpose of qualifying the alien as a skilled worker (citing 20 C.F.R. § 656.20(c)(8)); and (3) the Alien's one year of paid experience as a Cook, as required for Schedule B occupations (citing 20 C.F.R. §§ 656.11, 656.21). (AF 20-23).

The Employer submitted its rebuttal by letter of February 17, 1994 through the letter of her attorney, a letter from the Alien's former employer verifying employment, and the Employer's supporting letter, in which she sets forth further information concerning the Alien's planned responsibilities, her hours of employment, and the Employer's entertaining schedule. (AF 9-19).

On June 7, 1994, the CO issued a Final Determination in which he accepted the Employer's rebuttal on the last issue but stated that the Employer still had not adequately documented that the position is full-time or that the job opportunity is a bona fide one open to U.S. workers. (AF 4-8).

The Employer and the Alien, through their attorney, requested reconsideration or, in the alternative, review of that denial on July 12, 1994. (AF 1-3). The CO denied the request for reconsideration by letter of July 19, 1994 and the application was forwarded to the Board of Alien Labor Certification Appeals. (AF A0).

## DISCUSSION

We agree with the CO that the application fails on the first of the two bases listed by the CO: failure to establish the existence of a full-time position as "Cook" (as required by 20 C.F.R. § 656.3). **See generally Dr. Marta de Pierris**, 93-INA-525 (Sept. 15, 1994). It is thus unnecessary for us to consider the second basis, the failure to establish a bona fide job opportunity open to U.S. workers.

Section 656.3 (formerly section 656.50) of title 20, Code of Federal Regulations defines "employment" as permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. **Mr. and Mrs. Stanley Tee**, 94-INA-10 (June 27, 1995), **citing Gerata Systems, Inc.**, 88-INA-344 (Dec. 16, 1988) (*en banc*). Where an employer

fails to demonstrate the volume of work necessary to support a full-time employee, it fails to establish full-time employment. ***Mr. and Mrs. Stanley Tee, supra; Tousi Rugs***, 92-INA-374 (Sept. 29, 1993).

In the instant case, the CO correctly noted discrepancies in the application. In the application as originally submitted, the following hours of work for the Alien were listed:

10. Total Hours Per Week

- |          |             |
|----------|-------------|
| a. Basic | b. Overtime |
| 40       | As needed   |

11. Work Schedule  
(Hourly)

9:00 a.m.  
5:00 p.m.

(AF 37). However, when the CO questioned the Employer as to whether the duties described would constitute full-time employment in the context of the Employer's household and requested specific information (including the number of meals prepared daily and weekly, the amount of time required for meal preparation, and the number of people for whom the meals were to be prepared), the Employer amended the application. As amended, the work hours remained the same but the work schedule was revised to read as follows:

11. Work Schedule  
(Hourly)

7:30-12:00  
4:30- 8:00

(AF 13). In support of this change, the Employer states that her household cook is responsible for the preparation of all weekday meals for her family, including two adults and two children. She estimates that on a typical day the cook will spend two to three hours preparing and serving breakfast, followed by cleaning the kitchen; one to two hours preparing lunch, including cleanup; and from 4:30 to 7:30 preparing, cooking, and serving dinner, in two settings. In addition, the cook also does baking so that the house is regularly supplied with breads, cakes, and pastries; she purchases groceries and other supplies and plans menus; she cooks for one small dinner party monthly; and she maintains the kitchen and dining room. (AF 11-12). In the cover letter, the Employer's attorney asks for the opportunity to submit additional information concerning the Employer's social schedule before the application is denied. (AF 9-10).

The Employer and her attorney did not, however, give any explanation for the change in hours from that originally listed on the labor certification application.

The CO questioned whether a full-time cook position really exists even under the new schedule submitted. Specifically, the CO stated:

Based on the revised schedule, 7:30 a.m. to 12:00 p.m. the alien would being [sic] preparing breakfast at 7:30 a.m. To take from 2 to 3 hours to prepare breakfast is unrealistic in a household setting. This would be the amount of time necessary to prepare breakfast for an entire restaurant. Furthermore, by the time breakfast would be prepared, only the husband would be at home to consume the meal since both children are in school in the morning and the employer is at work by 9:00 a.m. Additionally, the preparation of lunch would not appear to require as much time as stated in the rebuttal since everyone would be gone for the day and only the husband and 1 child would require lunch. The 1 to 2 hours including cleanup is extreme especially since the alien is finished the first part of her work day by 12:00 noon. The child would not be home from school yet and the husband has barely finished breakfast before he is set to have lunch. Lastly, the amount of time spent on breakfast would seriously deplete the time available to spend on lunch preparation before the alien leaves at noon.

(AF 6-7). We share the CO's skepticism concerning whether this revised schedule actually reflects a full-time job opportunity for a Cook.

Although along with the Employer's Brief, the Employer has submitted an affidavit by the Employer's husband and his resume, in order to provide additional information as to the needs of the Employer's household, we cannot consider this additional information in making our determination. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). **See also** 20 C.F.R. § 656.26(b)(4). Here, the Employer has failed to assert a basis for not having submitted the subject information as part of the rebuttal and it should not be considered now. **See Sharp Screen Supply, Inc.**, 94-INA-214 (May 25, 1995); **ST Systems, Inc.**, 92-INA-279 (Sept. 2, 1993); **Schroeder Brothers Co.**, 91-INA-324 (Aug. 26, 1992); **Kem Medical Products Corp.**, 91-INA-196 (June 30, 1992).

In view of the above, the Employer has failed to satisfy her burden of establishing the need for a full-time cook and the application must be denied. It is thus unnecessary to consider the remaining issue.

In view of the above, the application should be denied.

**ORDER**

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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PAMELA LAKES WOOD  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

## BALCA VOTE SHEET

Case Name: Maryse Pierre-Louis  
(Alien: Jeanette Daran)

Case No. : 94-INA-598

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:			
	:	CONCUR	:	DISSENT	:	COMMENT	:
	:	:	:	:	:	:	:
Vittone	:	:	:	:	:	:	:
	:	:	:	:	:	:	:
Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Wood

Date: